
INTERIOR BOARD OF INDIAN APPEALS

Bekco Oil and Gas Corp. v. Acting Muskogee Area Director, Bureau of Indian Affairs

18 IBIA 202 (03/26/1990)

# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203


BEKCO OIL AND GAS CORP.
v.
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-91-A Decided March 26, 1990

Appeal from a finding that an oil and gas lease had expired by its own terms.

Affirmed.

1. Appeals: Generally--Indians: Leases and Permits: Generally

Notification given to a lessee by the Bureau of Indian Affairs that a lease has expired by its own terms is an appealable action within the meaning of 25 CFR 2.2.

APPEARANCES: J.K. Mayes, Jr., Esq., Muskogee, Oklahoma, for appellant; Alan R. Woodcock, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Bekco Oil and Gas Corporation seeks review of a July 12, 1989, letter from the Acting Muskogee Area Director, Bureau of Indian Affairs (BIA; appellee), stating that oil and gas lease 65097, Contract 14-20-402-1463, David L. Berryhill, Creek 132 (lease), had expired by its own terms for lack of production. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

## Background

The lease, which covers the S½ NE¼, sec. 17, T. 14 N., R. 13 E., Okmulgee County, Oklahoma, containing 80 acres more or less, was entered into on September 15, 1953, between David L. Berryhill, lessor, and J.M. O'Loughlin, lessee. The term of the lease was for "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." The lease was approved on October 1, 1953. Through a series of transactions occurring after lease approval, appellant now holds the lease.

On October 16, 1985, the Muskogee Area Realty Officer wrote appellant concerning the pending assignment of interest from two predecessor-in-interest corporations to appellant. The Realty Officer noted that the "assignment was pending, awaiting clearance from the Bureau of Land Management [BLM]. [BLM's] report reflected that the subject lease has not produced since April 1983. In order for this lease to remain in force, we need to be advised of the status of the lease."

Appellant's president responded to the letter, stating: "I received 'order nunc pro tunc' from N. Eastern Bankruptcy court this date [Nov. 5, 1985] and have possession of above mentioned lease. Since it has been closed down over 2 years, I expect to have quite extensive repairs to make but am prepared to order parts and prepare to put into production as soon as possible."

On July 10, 1987, BLM wrote appellant and requested information concerning development activities on the lease so that it could determine whether the lease was being developed diligently in accordance with the prudent operator rule. After receiving and reviewing information from appellant, BLM issued a decision on October 5, 1987, which stated:

> Based on this information, we agree that an additional development well on this leasehold may be too risky at this time due to the current economics and the limited production potential of an additional well in this formation. However, it is imperative that Bekco Oil and Gas Corporation reestablish production on this leasehold as soon as possible in order to prevent this lease from being terminated for failure to produce.
>
> Your plan of development for Lease No. 65097 is hereby approved. However, delay in the implementation of this plan may result in a recommendation to the Bureau of Indian Affairs to terminate the lease for failure to produce.

By memorandum dated November 3, 1988, BLM informed appellee that:

> The subject lease, extended past its fixed term by production of oil and gas in paying quantities, ceased production during December 1981. The six wells on the leasehold were marginal producers. In July 1987, the lease was reviewed for diligent development and a plan of development was requested for the subject lease. In a letter dated September 23, 1987, the lessee indicated that he planned to rework some of these wells and return the lease to producing status. However, as of this date, no action appears to have been taken.
>
> * * * [I]t is our opinion that Lease No. 65097 may be subject to expiration as of December 31, 1981, the last day of the month during which there was reported production. It is recommended that the lease be reviewed for expiration and the lessee be informed of your determination.

On July 12, 1989, appellee issued the letter under review here. Appellee accepted BLM's recommendation and informed appellant that December 31, 1981, was the last day of the month during which there was reported production. The letter states: "This is your official notice that this lease has expired under its own terms."

The Board received appellant's notice of appeal from this notification on August 14, 1989. Both appellant and appellee filed briefs on appeal.

Discussion and Conclusions

Appellee raises a threshold argument that the Board lacks jurisdiction over this matter for two reasons: (1) BIA merely recognized the lack of production from this lease. It took no "action" within the meaning of 25 CFR 2.2; 1/ and (2) under Oklahoma law, which appellee states is applicable to this lease, expiration of a lease for failure to produce does not occur automatically, but requires a judicial determination that no equities exist which would justify continuation of the lease. In support of this argument, appellee cites Magnolia Petroleum Co. v. Wilson, 215 F.2d 317 (10th Cir. 1954), and Stewart v. Amerada Hess Corp., 604 P.2d 854 (Okla. 1980).

[1] The Board has previously held that a BIA determination that a lease has expired by its own terms does not constitute a cancellation of the lease. Idaho Mining Corp. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 249, 261 (1983). 2/ That holding, however, does not mean that BIA has not taken an "action" by notifying a lessee of its determination of lease expiration. Clearly, in order to make such a determination, BIA has frequently considered a recommendation made to it by BLM, reviewed its own records, and exercised some degree of independent judgment and expertise in reaching the conclusion that the lease can be deemed to be in a condition that is not permissible under its terms. Furthermore, BIA has taken the step of notifying the lessee of the results of its investigation. A determination that the lease has expired by its own terms is clearly adverse to the interests of the lessee. The Board holds that BIA's notification to a lessee that a lease has expired by its own terms is an appealable action within the meaning of 25 CFR 2.2.

Appellee's second argument against Board jurisdiction is merely a restatement of the self-evident legal principle that decisions of the Department of the Interior are subject to judicial review. In the absence of appeal to Federal court, a Departmental determination that a lease has expired by its own terms is effective. If an appeal is taken from such a

---

1/ 25 CFR 2.2 defines "appeal" as "a written request for review of an action or the inaction of an official of the Bureau of Indian Affairs that is claimed to adversely affect the interested party making the request."

2/ Rev'd on other grounds, Wilson v. United States Department of the Interior, No. CV-R-83-350-BRT (D. Nev., Aug. 7, 1985); vacated and remanded as moot, 799 F.2d 591 (9th Cir. 1986).

Departmental determination, our system of separation of powers allows the judiciary to reverse a determination made by an Executive agency in the exercise of authority vested in it by Congress. The fact, however, that a final Departmental decision may be reviewed in court does not mean that a BIA determination is not subject to further review within the Department. This is the entire purpose for providing avenues of administrative review such as those established in 25 CFR Part 2 and 43 CFR Part 4.

Appellee's further contention, that the courts have equitable powers beyond those enjoyed by the Department, is also not persuasive. Regulation of Indian oil and gas leases has been delegated to BIA and BLM for the exercise of agency expertise, not for the mere application of inflexible formulae. The exercise of expertise requires that the agency use judgment in responding to situations arising in the operation of a lease. Such judgment involves the weighing of equitable considerations as well as legal and factual evidence in determining what action is appropriate under the particular circumstances arising with regard to a specific lease.

The Board rejects appellee's argument that it lacks jurisdiction over this appeal.

In support of its appeal, appellant argues that it has the best interests of the lessor in mind because it is, itself, a partial owner of the minerals being produced. In addition, it contends that it has evidenced its willingness to bring the lease into production and would have done so had it not been for four events that were beyond its control: (1) the delay in acquisition of the leases because of the bankruptcy of its predecessor-in-interest, (2) the economic disaster caused by the oil crises, (3) the depressed market conditions, and (4) two acts of God, in the form of ice and lightning storms, that damaged equipment and caused delays by necessitating extensive repairs.

Appellee suggests that a temporary interruption in production may be excused as long as the interruption does not exceed a reasonable period. Citing Jath Oil Co. v. Durbin Branch, 490 P.2d 1086 (Okla. 1971), he argues that the period since December 1981 or April 1983 3/ is not a reasonable period for there to have been no reported production. He further contends that appellant's explanations for why there has not been reported production are insufficient and do not cover the entire period of nonproduction.

The Board finds that appellant has not refuted BIA's finding that there has been no reported production from this lease since at least April 1983, and has not raised other arguments sufficient to justify the Board's ordering BIA to reconsider the determination that this lease has expired by its own terms.

---

3/ The administrative record does not contain information on reported production except as is discussed in BIA and BLM communications. The statements made by BIA and BLM as to last reported production do not agree. Appellant has not, however, contested that there has been no reported production since at least April 1983, the later date cited in the record.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Muskogee Area Director's July 12, 1989, decision is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge